MEILEN PRESS INC. — N. Y. C. 219

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1087

TOBACCO WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 192,

Petitioner,

v.

EDGAR RUSSELL, *et al.*,

Respondents.

OPPOSITION TO WRIT OF CERTIORARI

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Statement

The history of discrimination in this case parallels patterns and practices of discrimination that have been found to be unlawful in other cases involving the tobacco industry.[1]

Petitioners do not challenge the findings below that the plaintiffs and the members of the class have been the victims of unlawful discrimination which in large measure was the result of a history of segregated local unions and a contractually mandated departmental seniority system.

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[1] *E.g.*, see *Quarles* v. *Phillip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971); *Cooper* v. *Phillip Morris, Inc.* 464 F.2d 9 (6th Cir. 1972).

Reasons for Denying the Writ

The questions presented by Petitioner do not justify the exercise of this Court's certiorari jurisdiction on two grounds.

First Ground

The first two questions present issues of law that are well settled. There is no conflict in the circuits that the existence of an adopted contract does not exculpate the union from liability under Title VII of the Civil Rights Act of 1964 (as amended 1972), 42 U.S.C. §2000e et seq. Indeed this Court's decisions in *Alexander* v. *Gardner-Denver,* 415 U.S. 36 (1974) and *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975) confirm that rights protected under Title VII cannot be bargained away in the give and take of the collective bargaining process.

Second Ground

The third question presented raises an issue before this Court that was not addressed below. This question is not appropriate for review by this Court.

ARGUMENT

I

The Decision Below Was Correctly Decided.

In essence, Petitioners argue for adoption of a rule exculpating unions from responsibility under Title VII upon a mere showing that all its members are eligible to participate in a ratification vote and that no member actively opposed ratification of the contract which has the effect of discriminating against the union's black members.[2] The circuit courts are unanimously in agreement with Judge Butzner's decision below that when a union has entered into a contract which has the effect of unlawfully discriminating that union is responsible for a share of the monetary loss suffered by victims of the discrimination.[3] Petitioner's reliance on *Thornton* v. *East Texas Motor Freight, Inc.*, 497 F.2d 416 (6th Cir. 1974) is inapposite because there the union was held not to be responsible. *Thornton* involved a company imposed a "no-transfer" rule which the union had actively opposed. 497 F.2d at 425. The ruling below for which the union seeks

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[2] There is a significant question of fact whether the discriminatees did vote for the contract. The record does not show that all the plaintiffs were at the vote meeting nor whether those that were did in fact vote for the agreement. (There was no secret ballot. Hand or voice voting, even if "unanimous," does not definitively establish that all present "voted.")

[3] *E.g.*, see *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Gamble* v. *Birmingham Southern Railroad Co.*, 514 F.2d 678 (5th Cir. 1975); *Carey* v. *Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974); *Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975); *Macklin* v. *Spector Freight System*, 478 F.2d 179 (D.C. Cir. 1973); *United States* v. *Navajo Freight Lines*, —— F.2d ——, 11 F.E.P. Cases 787 (C.A. 9, 1975).

review here relates to union responsibility for two contractually mandated rules,[4] which had the effect of unlawfully discriminating against the union's black members. As the Sixth Circuit stated in *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301, 314 (6th Cir. 1975):

> It has long been settled that a union must attempt to protect its minority members from discriminatory acts of an employer (citation deleted). This obligation requires a union to assert the rights of its minority members in collective bargaining sessions and not passively accept practices which discriminate against them (citation deleted). Acquiescence in a departmental seniority system which produces unequal treatment on the basis of race is sufficient to subject a union to liability under Title VII (citation deleted).

The decision in the Fourth Circuit is compelled by this Court's decision in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) and *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). In *Moody*, this Court held that mere good faith was not a defense to liability for back pay since the twin objectives of Title VII are to compensate the employees for economic loss and to assure affirmative compliance with the Act. This Court made it amply clear in *Alexander* that rights and remedies under Title VII could not be confined within the borders of union contracts and arbitration procedures. "Title VII . . . concerns not the majoritarian process but an individual's right to equal employment opportunities," 415 at 51. Further, Petitioner's implication of waiver of rights by ratification of the con-

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[4] The two rules are a "lock-in" departmental seniority system and a six-month probationary period. As to the latter, the Company had proposed a shortening of the probationary period to 35 days but the union actively opposed this proposal in order to protect certain of its white members. See pages 13 and 14 of Appendix to Petition for a Writ of Certiorari.

tract thereby relieving it of liability is contrary to this Court's teaching in *Alexander:* "We think it clear that there can be no prospective waiver of an employee's rights under Title VII," 415 U.S. at 51.

Petitioner's theory of immunity from liability under Title VII makes a violation by the union of the Labor Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act), 29 U.S.C. §401, et seq. a condition precedent to liability under Title VII of the Civil Rights Act of 1964. The Congressional purpose in Title VII of compensating discriminatees and ending employment discrimination is independent of the statutory objective of Landrum-Griffin of ensuring union democracy. Compliance with Landrum-Griffin is not a license to violate Title VII.

II

Petitioner's Third Question Presented Is Not Appropriate for Review by This Court Because It Was Not Addressed by the Courts Below.

The question of Petitioner's liability for the discriminatory selection of foremen and assistant foremen by the Company was not addressed or decided by the courts below.

Petitioner's concern is that the lower court's determination of the amount of its back pay liability "might well include" [5] responsibility for failure to promote blacks to supervisory positions even though such promotion decisions are exclusively within the discretion of the Company.[6]

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[5] Page 11 of Petition for a Writ of Certiorari.

[6] The question of the extent to which the union is or is not responsible for the loss suffered by blacks who have been excluded from supervisory positions is presumably a disputed issue of fact which must be resolved by the district court in the first instance. For example, on remand the Company may seek to demonstrate

Petitioner's concern is premature since the lower court has not yet made any determination on this issue. Clearly this issue is not ripe for review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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that while it alone selects foremen and assistant foremen, composition of the pool from which those foremen are selected results from operation of provisions of the collective bargaining agreement. The union might seek to prove that placement in jobs within the bargaining unit has little or nothing to do with selection for supervisory positions.